(3)

No. 00-139

Supreme Court, U.S.
FILED
AUG 15 2000
CLERK

In the Supreme Court of the United States

MICROSOFT CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, ET. AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN RESPONSE TO THE JURISDICTIONAL STATEMENT

SETH P. WAXMAN
Solicitor General
Counsel of Record

JOEL I. KLEIN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

45pp

QUESTIONS PRESENTED

Microsoft Corporation's statement of the questions presented (J.S. i-ii) identifies seven issues for review by this Court:

1. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by engaging in a course of exclusionary conduct to protect and maintain its personal computer (PC) operating system monopoly.

2. Whether the district court erred in holding that Microsoft violated Section 2 of the Sherman Act, 15 U.S.C. 2, by attempting to monopolize the market for Web browsers.

3. Whether the district court erred in holding that Microsoft violated Section 1 of the Sherman Act, 15 U.S.C. 1, by tying its Internet Explorer Web browser to its Windows operating system through contracts and technological artifices.

4. Whether any of the district court's procedural and evidentiary rulings constituted an abuse of discretion requiring reversal of the judgment.

5. Whether the district court abused its discretion by ordering structural separation of Microsoft into two entities and transitional restrictions on its conduct.

6. Whether the district court erred in dismissing Microsoft's counterclaim under 42 U.S.C. 1983, alleging that state attorneys general, under color of state law, sought relief in this case that would deprive Microsoft of its rights under federal copyright law.

7. Whether the district judge's extrajudicial comments about the case require reversal of the judgment.

TABLE OF CONTENTS

	Page
Statement	1
Argument:	
I. This case warrants the Court's immediate consideration because the appeal is of "general public importance in the administration of justice"	13
II. Microsoft's contentions that the Court should deny the appeal, despite its importance, are unpersuasive	18
A. The legal issues are appropriate for direct appeal	19
B. The factual record presents no obstacle to direct review	25
C. Postponing this Court's review to permit review by the court of appeals would not promote the administration of justice	28
Conclusion	30
Addendum A	1a
Addendum B	7a

TABLE OF AUTHORITIES

Cases:

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999)	19
Amadeo v. *Zant*, 486 U.S. 214 (1988)	27
American Textile Mfrs. Inst. v. *Donovan*, 452 U.S. 490 (1981)	27
Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985)	2, 26, 28
Aspen Skiing Co. v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)	20
Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)	26
California v. *United States*, 464 U.S. 1013 (1983)	15

Cases—Continued: Page

Citizen Publ'g Co. v. *United States*, 394 U.S. 131 (1969) 24
Clinton v. *New York*, 524 U.S. 417 (1998) 30
Colorado v. *New Mexico*, 467 U.S. 310 (1984) 27
Eastman Kodak Co. v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992) 20, 22
Ford Motor Co. v. *United States*, 405 U.S. 562 (1972) 24
Gay v. *Ruff*, 292 U.S. 25 (1934) 30
IBM Corp. v. *United States*, 480 F.2d 293 (2d Cir. 1973), cert. denied, 416 U.S. 980 (1974) 29
International Boxing Club v. *United States*, 358 U.S. 242 (1959) 24
International Salt Co. v. *United States*, 332 U.S. 392 (1947) 24
Jefferson Parsh Hosp. Dist. No. 2 v. *Hyde*, 466 U.S. 2 (1984) 22
Kansas v. *Colorado*, 514 U.S. 673 (1995) 27
Maryland v. *United States*, 460 U.S. 1001 (1983) 15, 16
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 26
Multi-Medical Convalescent & Nursing Ctr. v. *NLRB*, 550 F.2d 974 (4th Cir.), cert. denied, 434 U.S. 835 (1977) 23
National Soc'y of Prof'l Eng'rs v. *United States*, 435 U.S. 679 (1978) 24
Neumann v. *Reinforced Earth Co.*, 786 F.2d 424 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986) 20
Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 22
Roe v. *Wade*, 410 U.S. 113 (1973) 30
Spectrum Sports, Inc. v. *McQuillan*, 506 U.S. 447 (1993) 21
United States v. *Alaska*, 521 U.S. 1 (1997) 27

Cases—Continued: Page

United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) 24
United States v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) 24
United States v. *Fordice*, 505 U.S. 717 (1992) 27
United States v. *Griffith*, 334 U.S. 100 (1948) 20
United States v. *Matlock*, 415 U.S. 164 (1974) 23
United States v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) 22
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948) 24
United States v. *Taylor*, 487 U.S. 326 (1988) 23
United States v. *United Shoe Mach. Corp.*, 391 U.S. 244 (1968) 24
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948) 27
United States v. *Western Elec. Co.*:
552 F. Supp. 131 (1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) 16
569 F. Supp. 1057 (D.D.C.), aff'd *sub nom. California* v. *United States*, 464 U.S. 1013 (1983) 16
1983-2 Trade Cases (CCH) ¶ 65,596 (D.D.C. 1983) 14, 15
United States Dep't of Commerce v. *Montana*, 503 U.S. 442 (1992) 19
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 25

Statutes and rules:

Expediting Act of 1903, ch. 544, 32 Stat. 823 13
15 U.S.C. 29(a) 13
15 U.S.C. 29(b) 1, 13, 14, 15
Sherman Act:
§ 1, 15 U.S.C. 1 (1994 & Supp. IV 1998) 1, 12
§ 2, 15 U.S.C. 2 ..... 1, 11, 20, 21, 23
28 U.S.C. 1254 15

Rules—Continued:	Page
Fed. R. Civ. P. 52(a)	2, 27
Sup. Ct. R. 18.2	30
Miscellaneous:	
3 Phillip Areeda & Donald F. Turner, *Antitrust Law* (1978)	20
119 Cong. Rec. 24,599 (1973)	14
120 Cong. Rec. (1974):	
pp. 38,583-38,587	14
pp. 39,123-39,124	14
H.R. Rep. No. 1463, 93d Cong., 2d Sess. (1974)	14
S. Rep. No. 1214, 91st Cong., 2d Sess. (1970)	14
S. Rep. No. 298, 93d Cong., 1st Sess. (1973)	14, 26
Robert L. Stern et al., *Supreme Court Practice* (7th ed. 1993)	15, 16

BRIEF FOR THE UNITED STATES IN RESPONSE TO THE JURISDICTIONAL STATEMENT

Because immediate consideration of this appeal is of general public importance in the administration of justice, the Solicitor General, on behalf of the United States, urges this Court to note probable jurisdiction under the Expediting Act of 1903, as amended, 15 U.S.C. 29(b).

STATEMENT

On May 19, 1998, the United States filed a civil complaint alleging that Microsoft Corporation has engaged in an anticompetitive course of conduct in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 (1994 & Supp. IV 1998). At Microsoft's request, the district court consolidated the case for all purposes with a similar case brought by 20 States and the District of Columbia. The district court conducted the proceedings expeditiously and, after a 78-day trial, entered its findings of fact (FF), App. 46-246, and its conclusions of law, App. 1-43. On the central issue in the case, the district court found that Microsoft had successfully engaged in a series of anticompetitive acts to protect and maintain its personal computer operating system monopoly, in violation of Section 2 of the Sherman Act. App. 3-21.

On June 7, 2000, the district court entered its final judgment. App. 253-279. That judgment requires Microsoft to submit a plan to reorganize itself into two separate firms and to comply with transitional injunctive provisions. *Ibid.* Microsoft filed notices of appeal. App. 280-283. Upon motion of the United States and the State plaintiffs, the district court concluded that Microsoft's appeal presents a matter "of general public importance in the administration of justice" and certified the case for direct appeal in accordance with the Expediting Act, 15 U.S.C. 29(b). At Microsoft's request, the district court stayed the judgment. See App. 284-285.

Microsoft opposes expedition of its own appeal. See J.S. 15-30. We submit, however, that direct appeal to this Court is warranted. In describing the case, we rely on the district court's factual findings, which "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).[1]

1. Personal computers (PCs), including the familiar "Intel-compatible" PCs (see Add. B, *infra*, 7a), accomplish useful tasks, such as word processing, through the use of an operating system and applications programs. FF 1-4 (App. 47-48). An operating system is "a software program that controls the allocation and use of computer resources"; it serves as a "platform" for applications "by exposing interfaces, called 'application programming interfaces,' or 'APIs,'" that applications invoke. FF 2 (App. 47). Microsoft "possesses a dominant, persistent, and increasing share of the worldwide market for Intel-compatible PC operating systems." FF 35 (App. 60). That share "has stood above ninety percent" for a decade. *Ibid.* The "original equipment manufacturers" of PCs (OEMs) "uniformly are of a mind that there exists no commercially viable alternative" to Microsoft's Windows operating system. FF 54 (App. 70-71).

The Windows monopoly is protected by an "applications barrier to entry." FF 30-32, 36 (App. 58-60, 61). The pervasiveness of the Windows operating system induces developers to create vastly more applications for Windows than for other PC operating systems. The availability of a rich array of applications in turn "attracts consumers to Windows." FF 37 (App. 61-62). A competing operating system will not attract a large number of users unless those users believe that there is and will continue to be a sufficient

[1] For the Court's convenience, we have provided, as addenda to this brief, an index to the appendix that accompanies Microsoft's jurisdictional statement (Add. A) and a glossary defining frequently used terms (Add. B).

and timely array of applications for use on that operating system, FF 30-31, 37 (App. 58-59, 61-62), but software developers have little incentive to write applications for an operating system without a large number of users. FF 40-41 (App. 63-64).

This formidable entry barrier can be eroded through "middleware." A middleware program invokes the APIs of the operating system on which it runs, but also exposes its own APIs and thus can serve as a platform for other applications. FF 28 (App. 57). An application written to rely on a middleware program's APIs thus could run on all operating systems on which that middleware runs. FF 68 (App. 78). Applications developers would have incentives to write for widely used middleware, and so users would not be reluctant to choose an alternative operating system for fear that it would run an insufficient array of applications. FF 29, 68 (App. 57-58, 78).

Microsoft "was concerned with middleware" because middleware could severely weaken the applications barrier and threaten the dominance of Windows. FF 29, 68 (App. 57-58, 78). Microsoft particularly focused "on two incarnations of middleware that, working together, had the potential to weaken the applications barrier severely * * *. These were Netscape's Web browser [Navigator] and Sun's implementation of the Java technologies." FF 68 (App. 78); see also FF 69-77 (App. 78-82).

a. Within months after Netscape publicly released Navigator in December 1994, Navigator became the preeminent Web browser. FF 72 (App. 79-80). Because of the likelihood that Web browsers would become ubiquitous, and because Navigator also has middleware capabilities, Microsoft soon perceived Navigator as a threat to the applications barrier to entry that protected its Windows operating system monopoly. In May 1995, Microsoft Chief Executive Officer William Gates wrote that Netscape was "pursuing a multi-platform strategy where they move the key API into

the client [Web browser] to commoditize the underlying operating system." FF 72 (App. 80). Microsoft determined to eliminate the threat that Navigator would become a viable alternative platform for applications. FF 133, 142 (App. 108-109, 113-114).

Microsoft first tried to reach a "market allocation" agreement with Netscape. App. 21-22; FF 79-92 (App. 83-89). The proposed agreement would have required Netscape to stop its efforts to develop Navigator into "platform-level" (i.e., API-exposing) browsing software for the upcoming Windows 95 operating system in return for Microsoft's refraining from developing browser products for other operating systems. FF 83 (App. 85). Microsoft "warned" (FF 91 (App. 89)) Netscape that its access to critical technical information about Windows APIs—information that Netscape needed to make its browser run well on Windows 95 (FF 82 (App. 84-85))—depended on Netscape's acquiescence. FF 84, 90 (App. 85-86, 88-89). Had Netscape gone along with Microsoft's scheme, it would have become "all but impossible" for Navigator or any other browser rival to pose a platform threat to Windows. FF 88-89 (App. 87-88). Netscape, however, refused to agree to Microsoft's proposal, FF 88, 91 (App. 87, 89), and Microsoft then withheld important technical information needed by Netscape. FF 91-92 (App. 89).

Microsoft understood that large numbers of developers would write to the APIs exposed by Navigator only if they believed Navigator would become "the standard" Web browser, FF 133 (App. 108), and that, if developers expected Microsoft's own browser, Internet Explorer (IE), to attract a large share of usage, they would continue to focus their efforts on the Windows platform, *ibid.* Microsoft therefore decided to engage in a multifaceted campaign to maximize IE's share of usage and minimize Navigator's. FF 133 (App. 109). Between 1995 and 1999 Microsoft spent more than $100 million each year and increased to more than a thou-

sand the number of developers working on IE, FF 135 (App. 109), even though Microsoft has given IE away free since its release in July 1995, FF 137 (App. 111). In addition, Microsoft decided "to constrict Netscape's access to the distribution channels that led most efficiently to browser usage" (FF 143 (App. 115))—installation by OEMs on new PCs and distribution by Internet access providers (IAPs) such as America Online. FF 144-145 (App. 115-116). Because "no other distribution channel for browsing software even approaches the efficiency" of those two channels, FF 145 (App. 116), Microsoft sought to "ensure that * * * OEMs and IAPs bundled and promoted Internet Explorer to the exclusion of Navigator," FF 148 (App. 117).

Microsoft's campaign to foreclose Netscape from the OEM channel involved a "massive and multifarious investment" in a "complementary set of tactics": (1) contractual restrictions forcing OEMs to take IE with Windows 95 and 98 and forbidding them from removing or obscuring it; (2) "additional technical restrictions to increase the cost of promoting Navigator"; (3) exchanging valuable incentives for OEMs' commitments to promote IE exclusively; and (4) threats to "penalize individual OEMs that insisted on pre-installing and promoting Navigator." FF 241 (App. 160-161).

Microsoft's contractual bundling of IE and Windows conflicted with the interests of its OEM customers and browser users, for "Web browsers and operating systems are separate products," FF 154 (App. 119), and "[m]any consumers desire to separate their choice of a Web browser from their choice of an operating system," FF 151 (App. 118). Nevertheless, by July 1995, Microsoft had concluded that bundling Windows 95 and IE, contrary to its initial plan, FF 156 (App. 120), was the "most effective way" to diminish Navigator's threat to the operating system monopoly. FF 157 (App. 120). Its OEM licenses required that OEMs not delete or modify any part of what Microsoft defined to be "Windows," including IE, FF 158 (App. 120), even by using

the "Add/Remove" capability Microsoft included in Windows 95 and promoted to users. FF 165, 175-176 (App. 123, 128-129). OEMs acquiesced, even though that prevented them from meeting consumer demand for PCs without IE, because "they had no commercially viable alternative to pre-installing Windows 95 on their PCs." FF 158 (App. 120-121). Microsoft's licensing requirement had no technical justification, FF 175-176 (App. 128-129), and "guaranteed the presence of [IE] on every new Windows PC system," FF 158 (App. 121). Microsoft "knew that the inability to remove [IE] made OEMs less disposed to pre-install Navigator onto Windows 95." FF 159 (App. 121).

Despite those contractual restraints, Microsoft officials believed they were not "going to win" the browser war simply by "[p]itting browser against browser," FF 166 (App. 124), so they decided to make technical changes in Windows 98 to ensure that removing IE from Windows is difficult and "running any other browser is a jolting experience." FF 160 (App. 122).[2] Unlike Windows 95, Windows 98 thus did not allow even users to "uninstall" IE with the Add/Remove feature, although Gateway, a major OEM, had expressly requested such a feature, and although users were permitted to uninstall numerous other features that Microsoft held out

[2] Microsoft Senior Vice President James Allchin complained to Group Vice President Paul Maritz that "[w]e are not leveraging Windows from a marketing perspective * * * . [W]e are not investing sufficiently in finding ways to tie IE and Windows together." FF 166 (App. 124-125). In Allchin's view, "[t]reating IE as just an add-on to Windows which is cross-platform [means] losing our biggest advantage—Windows marketshare." FF 166 (App. 123-124). Maritz agreed and, to "combat" Netscape, FF 168 (App. 125), decided to delay the release of Windows 98 until IE 4.0 could be bound with it, "even if OEMs suffer[ed]" by missing important seasonal sales opportunities. FF 167 (App. 125). That decision "delayed the debut of numerous features * * * that Microsoft believed consumers would find beneficial, simply in order to protect the applications barrier to entry." FF 168 (App. 126).

as integrated into Windows 98. FF 170 (App. 126-127). Binding IE to Windows 98 also produces "unpleasant consequences for users" of Navigator, FF 172 (App. 127), because it can "override the user's choice" of browsers and require even Navigator users "to employ [IE] in numerous situations that, from the user's perspective, are entirely unexpected." FF 171 (App. 127). There is no technical justification for that binding.[3]

Despite those technical obstacles, Microsoft still feared that OEMs might install Navigator in addition to IE and might even configure the icons on the initial computer screen, and arrange the boot (start-up) sequence, to promote the use of Navigator rather than IE. FF 202-203 (App. 139-140). Microsoft thus "threatened to terminate the Windows license of any OEM" that did so or added "programs that promoted third-party software to the Windows 'boot' sequence." FF 203 (App. 140); see also FF 206, 208 (App. 141-142). Microsoft's tactics "soured" its relations with OEMs generally and also "stymied innovation that might have made Windows PC systems more satisfying to users. Microsoft would not have paid this price had it not been convinced that its actions were necessary to ostracize Navigator from the vital OEM distribution channel." FF 203 (App. 140).[4]

[3] Microsoft "could offer consumers all the benefits of the current Windows 98 package by distributing the products separately and allowing OEMs or consumers themselves to combine the products if they wished." FF 191 (App. 134); see also FF 187-193 (App. 133-136). Microsoft's technical binding of IE made OEMs even less likely to install Navigator on their PCs. FF 172 (App. 127).

[4] Furthermore, although IE was a "no revenue" product, FF 142 (App. 114), Microsoft nevertheless offered OEMs valuable incentives and discounts "to promote [IE] and, in some cases, to abstain from promoting Navigator," FF 139, 231-234 (App. 112, 155-157). Together with the other components of its campaign to foreclose the OEM channel to Netscape, these measures required Microsoft to pay out "huge sums of money, and

Microsoft "largely succeeded in exiling Navigator from the crucial OEM distribution channel." FF 239 (App. 159). By January 1998, Microsoft executive Joachim Kempin was able to report to CEO Gates and others that Navigator was being shipped through only four of the 60 OEM distribution sub-channels. FF 239 (App. 160). Even then, Navigator was most often in a position "much less likely to lead to usage" than IE's position. *Ibid.* Within a year, "Navigator was present on the desktop of only a tiny percentage of the PCs that OEMs were shipping." *Ibid.*

Microsoft's strategy for foreclosing Netscape from the other crucial channel of distribution, Internet access providers that provide browser software to their customers, FF 242 (App. 161-162), similarly involved both huge expenditures and substantial sacrifices of revenue that made no business sense except as a way of protecting the applications barrier to entry. FF 139, 247 (App. 111-112, 163). Microsoft "believed that, if IAPs gave new subscribers a choice between [IE] and Navigator, most of them would pick Navigator." FF 243 (App. 162). Accordingly, Microsoft gave IAPs valuable incentives to promote and distribute IE and to inhibit promotion and distribution of Navigator. FF 139 (App. 112). Its actions, which "sealed off a major portion of the IAP channel from the prospect of recapture by Navigator," FF 247 (App. 164), "had, and continue to have, a substantial exclusionary impact," FF 308 (App. 194).[5]

---

sacrifice[] many millions more in lost revenue every year." FF 139 (App. 111). The campaign was "only profitable to the extent that it protected the applications barrier to entry" and so preserved the operating system monopoly. FF 141 (App. 113).

[5] For example, Microsoft exchanged valuable promotional placement on the Windows desktop for the leading IAPs' agreement to distribute Navigator to no more than 15%-25% of their subscribers even when more of them wanted Navigator, to refrain from promoting Navigator, and even to refrain from mentioning to subscribers that they could use a browser other than IE. FF 244-245, 258 (App. 162-163, 168-169). Microsoft also

Microsoft's resulting control of the two distribution channels through which "a very large majority of those who browse the Web obtain their browsing software," FF 144 (App. 115), together with its other efforts to protect the applications barrier, caused browser usage shares to "change[] dramatically in favor of [IE]." FF 360 (App. 220). This prevented Navigator from becoming "an attractive enough platform * * * to weaken the applications barrier to entry." FF 378 (App. 229).[6] Microsoft's numerous and varied actions against Navigator "'would not be considered profit maximizing except for the expectation that . . . the entry of potential rivals' into the market for Intel-compatible PC operating systems will be 'blocked or delayed.'" App. 20 (citation omitted); see also FF 136-142 (App. 110-114).

b. Microsoft also feared another middleware technology—Sun Microsystems' Java—a programming language with related middleware that enables applications "written in Java" to run on different operating systems. FF 73-74 (App. 80-81). Java technology threatened to erode the applications barrier to entry, FF 75-77 (App. 81-82), and Microsoft sought to extinguish the Java threat by "maximizing the difficulty with which applications written in Java could be ported [i.e., adapted] from Windows to other platforms, and vice versa." FF 386 (App. 232).

Microsoft induced the development of Java programs that performed well on Windows but would not run on other operating systems without significant modifications. FF

---

gave IAPs financial incentives. FF 246 (App. 163). Microsoft "invested [these] great sums, and sacrificed potential sources of revenue, with the sole purpose of protecting the applications barrier to entry." FF 308 (App. 194); see also FF 247 (App. 163-164).

[6] Microsoft improved IE over time, but it still recognized in May 1998 that "IE4 is fundamentally not compelling" and "[n]ot differentiated from Netscape v[ersion]4—seen as a commodity." Thus, "superior quality was not responsible for the dramatic rise [in IE's] usage share." FF 375 (App. 227).

387-394 (App. 232-236). Microsoft, like others, developed a "Java Virtual Machine" (JVM) for the Windows operating system. FF 388 (App. 233). A JVM is a computer program that translates Java-based programs into instructions that the operating system can understand and execute. FF 73 (App. 80); see Add. B, *infra*, 8a. Microsoft's JVM and developer tools incorporated Windows-specific features in a way that makes a Java program designed to rely on those features more difficult to port to another operating system. FF 388-390 (App. 233-234). Microsoft took steps to ensure that developers would write Java programs that used those features; it conditioned early access to Windows technical information on using Microsoft's JVM as the default, FF 401 (App. 239), and it failed to warn applications developers about the porting consequences of reliance on Windows-specific features of its development tools, FF 394 (App. 235-236). Microsoft undertook other actions to discourage developers from creating Java applications compatible with non-Microsoft JVMs, and those actions made no business sense except as a means of protecting the applications barrier to entry. FF 388-394, 401-404, 406 (App. 233-236, 239-242).[7]

Microsoft's avowed aim was not to innovate, or to give consumers a better product; it directly acted to prevent Sun

[7] Microsoft's determination to cripple Sun's cross-platform Java was related to its actions against Netscape's Navigator. FF 77 (App. 82). In May 1995, Netscape announced that it would include a Sun-compliant Windows JVM with every copy of Navigator, creating the possibility that Sun's Java implementation "would achieve the necessary ubiquity on Windows" to pose a threat to the applications barrier to entry. FF 395 (App. 237). Microsoft responded not only by restricting distribution of Navigator and bundling its own JVM with IE, but also by pressuring Intel, which was developing a high-performance Windows-compatible JVM, not to "share its work with either Sun or Netscape, much less allow Netscape to bundle the Intel JVM with Navigator." FF 396-397 (App. 237-238); see also FF 405 (App. 241).

from creating Java APIs, and, as Microsoft executive Eric Engstrom put it, "especially ones that run well * * * on Windows." FF 406 (App. 242). Microsoft ultimately succeeded in impeding Java's ability to weaken the applications barrier to entry with a series of actions "whose sole purpose and effect were to do precisely that." FF 407 (App. 243). Microsoft pursued its "dedication to the goal of protecting the applications barrier to entry" despite "the fact that its efforts to create incompatibility between its JVM and others resulted in fewer applications being able to run on Windows than otherwise would have." *Ibid.*

2. Based on the conduct described above, along with numerous other instances of predatory and exclusionary conduct detailed in other findings, see, *e.g.*, FF 93-132 (App. 89-108), the district court found that, "[t]o the detriment of consumers," Microsoft had undertaken a coordinated series of actions "designed to protect the applications barrier to entry, and hence its monopoly power, from a variety of middleware threats." FF 409 (App. 244).[8] The district court entered conclusions of law holding that Microsoft violated Section 2 of the Sherman Act by engaging in anticompetitive acts to maintain its operating system monopoly, App. 3-21, and that it had committed other violations of antitrust law, App. 21-42.[9]

[8] Microsoft's anticompetitive campaign "has retarded, and perhaps altogether extinguished, the process by which these two middleware technologies could have facilitated the introduction of competition into an important market." FF 411 (App. 246). Furthermore, "Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. * * * The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." FF 412 (App. 246).

[9] The court concluded that Microsoft violated Section 2 of the Sherman Act by attempting to monopolize the market for Web browsers, App.

The district court thereafter entered its final judgment, which requires Microsoft to submit a plan to reorganize itself into two separate firms ("OpsCo" to receive the operating system business and "AppsCo" to receive the rest) and to comply with transitional injunctive provisions.[10] App. 253-257. The court found that a structural remedy is "imperative," App. 249, and that the government's plan addressed "all the principal objectives of relief in such cases," App. 251. The court found Microsoft's alternative proposal "plainly inadequate." *Ibid.* This appeal followed.[11]

21-24, and Section 1 of the Sherman Act by tying its Web browser to its operating system, App. 25-33. The court found that the conduct that violated the Sherman Act also violated various state laws. App. 39-42. The court rejected the United States' claim that Microsoft's exclusive dealing contracts violated Section 1 of the Sherman Act, but it did so on the basis of its analysis of effects in the Web browser market. App. 34-39. The court recognized that those contracts contributed, however, to Microsoft's maintenance of the operating system monopoly. App. 38. Although we disagree with the legal standard that the court arguably applied to the exclusive dealing claim, the United States has had no occasion to seek further review of the court's exclusive dealing ruling because the court has effectively terminated the unlawful practices as part of its Section 2 remedy. See note 10, *infra*.

[10] The final judgment, inter alia, requires Microsoft to treat major OEMs uniformly in licensing its operating system (¶ 3(a)(ii) (App. 260-261)) and to disclose the same technical and interface information to software and hardware developers that its own software developers use (¶ 3(b) (App. 262-263)). It prohibits adverse action against OEMs based on OEM decisions to use or promote products that compete with Microsoft products (¶ 3(a)(i) (App. 259-260)); bans exclusive dealing agreements that restrict third parties from using or promoting competing products (¶ 3(e) (App. 264)); and bans contractual tying and binding of certain middleware to its operating system (¶ 3(f) and (g) (App. 265-266)). Those provisions remain in effect for three years after implementation of divestiture. ¶ 3 (App. 259).

[11] On June 13, 2000, Microsoft appealed to the court of appeals, App. 280, 282, which the same day ordered the case to be heard en banc, App. 311-312. On June 20, 2000, the district court determined that the final judgment should be appealed directly to this Court under the Expediting

ARGUMENT

The Expediting Act expressly provides for direct appeal to this Court in that rare instance in which immediate consideration of an appeal in a civil injunctive antitrust case brought by the United States is of "general public importance in the administration of justice." 15 U.S.C. 29(b). This is such a case. The suit has immense importance to our national economy. It is especially important to the rapidly developing high-technology sectors, which need to know how they will be affected by the remedies resulting from this case and, more generally, how this Court's antitrust jurisprudence applies to a dominant firm in their marketplace. The public interest requires prompt and final resolution of the issues on appeal, both so that effective remedies can be put in place to restore competitive conditions and protect consumers and so that the computer and software industries can plan for the future. The findings of fact are cogent and complete, and the legal issues are ready for this Court's review. The Court should note probable jurisdiction.

I. This Case Warrants The Court's Immediate Consideration Because The Appeal Is Of "General Public Importance In The Administration Of Justice"

From 1903 to 1974, this Court directly reviewed all appeals in civil injunctive antitrust cases brought by the United States. See Expediting Act of 1903, ch. 544, 32 Stat. 823. Over time, Congress determined that direct appeal in all such cases posed an unnecessary burden on this Court. In 1974, Congress gave the courts of appeals jurisdiction over routine appeals. See 15 U.S.C. 29(a). At the same time,

---

Act and, as requested by Microsoft, stayed the final judgment in its entirety pending appeal. App. 284-285. The court of appeals immediately suspended its proceedings in the case.

Congress gave this Court discretion to hear a direct appeal if the district court certified, at the request of any party, that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." 15 U.S.C. 29(b).

This Court should exercise its discretion under 15 U.S.C. 29(b) in light of Congress's expressed desire to preserve direct appeals in that limited situation. Congress relieved the Court of the task of reviewing routine antitrust appeals, but Congress concluded, as a matter of national policy, that the Court should continue to decide direct appeals "where the underlying antitrust judgment involves matters of great and general importance to the public interest because of their 'impact on the economic welfare of this nation.'" *United States* v. *Western Elec. Co.*, 1983-2 Trade Cas. (CCH), ¶ 65,596, at 68,971 (D.D.C. 1983) (quoting H.R. Rep. No. 1463, 93d Cong. 2d Sess. 14 (1974)).[12]

[12] The legislative history of the 1974 Expediting Act amendments reveals that the Senate and the House disagreed over whether the Attorney General or the district court should be responsible for certifying that the case is of "general public importance," but both chambers agreed that the Court would be the final judge of that matter and expected that the Court would accept review if it agreed that the case satisfied that standard. See generally H.R. Rep. No. 1463, *supra*, at 12-14; S. Rep. No. 298, 93d Cong., 1st Sess. 3-4, 7-8 (1973); 120 Cong. Rec. 38,583-38,587 (1974); 119 Cong. Rec. 24,599 (1973). The House acceded to the Senate proposal, which empowered the district court to certify and expressly acknowledged the Court's "discretion" to accept or deny review. See 120 Cong. Rec. 39,123-39,124 (1974). As the Senate floor manager noted, the Senate proposal differed from the House proposal "only in the way the [certification] decision is made." *Id.* at 38,585. The legislative history also reveals that Congress understood that the "general public importance" standard reaches cases affecting "the economic welfare of this nation." H.R. Rep. No. 1463, *supra*, at 14; see also S. Rep. No. 1214, 91st Cong., 2d Sess. 4 (1970) (letter of Attorney General Mitchell to the Vice President) (such appeals "will usually involve novel legal questions pertaining to the interpretation or enforcement of the antitrust laws or may have serious

Congress's grant of jurisdiction under the Expediting Act differs fundamentally from, and operates in addition to, Congress's open-ended grant of certiorari jurisdiction under 28 U.S.C. 1254. The Expediting Act, unlike the certiorari statute, is limited by subject matter and requires district court certification. See 15 U.S.C. 29(b). But most importantly, it provides the Court with an express standard —"general public importance in the administration of justice"—to guide the Court's exercise of discretion. The purpose of the amended Act remains to "[e]xpedit[e]" the final resolution by this Court of cases meeting that standard. Congress plainly intended that the Court would decide whether to accept review based on the appeal's practical consequences for the national economy and the needs of effective antitrust enforcement—not on whether the Court would normally grant certiorari (or certiorari before judgment) in such a case. See Robert L. Stern et al., *Supreme Court Practice* § 2.7, at 53 (7th ed. 1993) ("Whether a case warrants direct review under § 29(b) turns on the importance of a prompt decision by the Court, not on the general significance of the legal issues presented.").

The United States recognizes that the need for direct appeal arises infrequently and does not lightly seek it. The United States has invoked the Expediting Act's direct review provisions in only two previous instances in the past 26 years. Those requests both arose from *United States* v. *Western Electric Co.*, *supra*, a Sherman Act suit against AT&T and its subsidiaries that bears close similarities to this case. In each instance, the Court accepted direct review. See *California* v. *United States*, 464 U.S. 1013 (1983); *Maryland* v. *United States*, 460 U.S. 1001 (1983).

The *California* and *Maryland* appeals arose from intervenor challenges to the AT&T consent decree, which re-

legal or economic consequences going beyond the mere private interests of the individual litigants").

quired AT&T to divest assets and restructure its operations.[13] Like the appeal in this case, the appeals in *California* and *Maryland* involved a government enforcement action against an "overwhelmingly dominant firm" in an important market and had resulted in a "structural remedy" to prevent abuse of monopoly power and "further the public interest in competition." 82-952 MA, at 13; see 83-737 MA, at 10-11. The United States urged the Court to hear the appeals, stating that "[w]hether a case warrants direct review * * * turns on the importance of a prompt decision of the case by this Court." 82-952 MA, at 10-11. The United States explained that "delay in resolving the validity of the decree will have a broad and significant adverse impact on the telecommunications industry, on related industries including data processing, and thus on the public in general." 82-952 MA, at 12; see also 83-737 MA, at 8-11.[14]

---

[13] See *Western Elec.*, 569 F. Supp. 1057; 552 F. Supp. 131. See also *Maryland*, 460 U.S. at 1001 (Rehnquist, J., dissenting); 82-952 et al., Motion of the United States to Affirm (82-952 MA) at 2-9; 83-737 et al., Motion of the United States to Affirm (83-737 MA) at 2-7; *Supreme Court Practice*, *supra*, at 54.

[14] Microsoft offers nothing to support its supposition that the Court accepted those appeals solely because (1) they "involved a negotiated consent decree"; (2) they "raised narrow legal questions" that the Court could resolve summarily; and (3) "AT&T supported immediate consideration." J.S. 26. The Court did not explain its reasons for accepting the direct appeal, but it is reasonable to presume that the Court relied on the Expediting Act's express criterion. The Act is clearly not limited to cases that involve a "consent decree" or "narrow legal questions" that are susceptible of summary disposition. The United States noted that e "issues raised by appellants are particularly suited to expedited direct review" (82-952 MA, at 16), but the United States did not suggest that that factor was a controlling consideration (see *id.* at 10-15). There is also no reason to believe that the defendant's support for direct review was a decisive factor. AT&T expressly supported direct review because the corporation had an interest in prompt resolution of the issues. See 82-952 Motion of AT&T to Affirm at 16-17. In this case, Microsoft, which has the benefit of a stay, apparently sees value in delay.

This case, like the *California* and *Maryland* appeals, clearly satisfies the Expediting Act's "general public importance" standard. The district court has determined that Microsoft, one of the Nation's largest companies and the dominant participant in the Intel-compatible PC operating system market, has taken unlawful actions to maintain its monopoly in that market. The court's remedy will directly impact competition in that important market and other related sectors, which in turn will directly affect the information-processing choices of virtually every computer user, including virtually every business and governmental entity, as well as hundreds of millions of consumers worldwide. In addition, the pendency of the appeal will likely affect Microsoft's workforce and its relations with other computer and software entities that form the burgeoning high-technology sectors of the economy.[15]

Microsoft itself has acknowledged the significance of this case to the Nation's economy. See, *e.g.*, J.S. 28. Indeed, Microsoft recently told the court of appeals that the district court's judgment may cause "the entire United States economy [to] * * * suffer." Microsoft Motion For Stay Pending Appeal 37 (D.C. Cir. June 13, 2000) (No. 00-5212). Recognizing "the exceptional importance" of the case, the court of appeals took the extraordinary step of ordering en banc consideration within an hour of the filing of Microsoft's notices of appeal. See J.S. 13; App. 311-312. To be sure, the court of appeals has taken steps within *its* power to expedite the appeal. But Congress has concluded that, in cases of "general public importance," those steps are not enough. The Expediting Act provides a mechanism, beyond the mea-

---

[15] See, *e.g.*, Microsoft Memorandum in Support of Motion for Summary Rejection of the Government's Breakup Proposal 5-6 (May 10, 2000) ("Not only may Microsoft lose irreplaceable employees, but third parties may be unwilling to enter into routine business agreements with Microsoft while its continued corporate existence remains in doubt").

sures available to the court of appeals, that should be utilized here.

Expedition is justified for a related reason as well. At the same time that the district court certified the case as one of general public importance, it also stayed its judgment pending appeal. App. 285. Prompt resolution of the appeal is therefore critical to effective federal and state antitrust enforcement. Microsoft steadfastly maintains that everything it has done was legal, see App. 249, so it likely will continue such conduct until the judgment goes into effect, *ibid.* Delay will postpone, and likely complicate substantially, the restoration of competition in the affected high-technology industries, which evolve at an extraordinary pace. Moreover, prolonged uncertainty about the outcome of this case creates significant inefficiencies. No firm in the affected industries can confidently plan or commit resources until it knows whether or when the final judgment will take effect.

In sum, all agree—and the evidence establishes—that the stakes in this case for the national economy are immense. If this case does not qualify for direct review under the Expediting Act, it is difficult to imagine what future case would.[16]

II. Microsoft's Contentions That The Court Should Deny The Appeal, Despite Its Importance, Are Unpersuasive

This case epitomizes the exceptionally important public antitrust case for which Congress has preserved direct review under the Expediting Act. For that reason alone, the

[16] Indeed, Microsoft does not contest the practical importance of its appeal. See J.S. 30. Rather, citing pre-1974 cases, Microsoft contends (J.S. 24-29) that the Court should ignore—effectively nullify—the amended statutory standard in a major category of cases to which the Act undeniably applies, by adopting a general policy of denying all direct appeals in contested cases under the Expediting Act.

Court should note probable jurisdiction. But even if the Court accepts Microsoft's invitation to look beyond the importance of the case and the consequent need for immediate resolution, Microsoft's rationales for denying direct review are not convincing. Microsoft essentially argues that this case is too legally and factually complex for this Court's review. J.S. 16-23. But this Court regularly decides complex cases, and, from 1903 to 1974, the Court routinely decided all such antitrust appeals. Congress has relieved the Court of that routine chore. The Court will not be unduly burdened by undertaking to resolve the singularly important appeal in this case—the first such appeal in 17 years.

A. The Legal Issues Are Appropriate For Direct Appeal. Microsoft argues that the legal issues it intends to raise are too complex and numerous for direct review. J.S. 19-23. Microsoft, however, overstates the complexity of this case, underestimates this Court's capabilities, and disregards the responsibility of *counsel* to "clear out"—rather than cultivate—"procedural and factual underbrush" (J.S. 23).[17]

Viewed realistically, Microsoft's appeal would require the Court to make, at most, five inquiries: whether the district court properly applied this Court's antitrust decisions respecting (1) monopoly maintenance, (2) attempted monopolization, and (3) tying; and whether the district court

[17] The Court regularly deals with legal issues that involve complex subject matter under its certiorari jurisdiction, *e.g.*, *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999) (validity of regulations implementing the Telecommunications Act of 1996), and on direct appeal, *e.g.*, *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992) (statistical techniques for apportionment). Furthermore, Microsoft's appeal—whether it proceeds in this Court or in the court of appeals—is unlikely to involve the number of inquiries that Microsoft projects. See J.S. 21-23 (cataloguing a non-exhaustive list of 19 issues). Imaginative appellate counsel can compile a long list of possible issues in almost any case, but the appellate process demands that counsel identify and limit themselves to questions that are worthy of the appellate court's consideration.

abused its discretion (4) in expediting the trial and admitting evidence, and (5) in selecting a remedy. See J.S. i-ii.[18] This Court is no less capable than the court of appeals of deciding those matters. And unlike the court of appeals, this Court can *dispositively* resolve the appeal and vindicate the enormous public interest in swift resolution of the case.

1. The central issue in this case is whether Microsoft violated Section 2 of the Sherman Act by engaging in a course of exclusionary conduct to protect and maintain its PC operating system monopoly. As this Court's decisions explain, the proscribed practice of monopolization is the willful acquisition or maintenance of monopoly power by the use of anticompetitive means "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992) (quoting *United States* v. *Griffith*, 334 U.S. 100, 107 (1948)). This Court has described such conduct as "exclusionary" and "predatory." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). If there are no "valid business reasons" for conduct that tends to impair the opportunities of a monopolist's rivals, it is exclusionary. See *Eastman Kodak*, 504 U.S. at 483; *Aspen*, 472 U.S. at 605 & n.32 (quoting 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 626b at 78 (1978)); see also, *e.g.*, *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir.) (Bork, J.), cert. denied, 479 U.S. 851 (1986).

The district court applied that standard (App. 6-8) to its findings of fact (App. 51-246), which describe a textbook example of monopoly maintenance (App. 9-21). See pp. 2-11,

[18] Microsoft's statement of the questions presented also includes a challenge to the district court's rejection of Microsoft's civil rights counterclaim against the state attorneys general, App. 42-43, and its suggestion that the district court's decision should be reversed on the basis of the judge's statements to the press. J.S. i-ii. Although Microsoft is free to raise those issues, they are not substantial questions that would warrant any significant expenditure of a reviewing court's time.

supra. The district court was accordingly correct in concluding that Microsoft has violated Section 2. The district court properly determined that Microsoft had monopoly power in a relevant market. App. 3-6. The court also concluded that Microsoft has engaged in a broad-ranging course of predatory conduct in which Microsoft sacrificed current wealth and opportunities to "perpetuate the applications barrier to entry" that protected its monopoly power. See App. 6-21. The court's decision on monopoly maintenance cogently addresses the relevant considerations and frames the issues for this Court's review. Indeed, the court explicitly addressed and rejected the arguments respecting monopoly maintenance that Microsoft proposes to raise on appeal. Its decision accordingly provides a systematic guide for addressing those arguments on appeal. App. 4-20.[19]

2. The district court's monopoly maintenance ruling is sufficient to establish liability and support all the relief in the final judgment. The district court additionally ruled, however, that Microsoft has violated Section 2 of the Sherman Act by unlawfully attempting to monopolize the market for Web browsers. App. 21-24. The court correctly stated that liability for attempted monopoly will attach if the plaintiff proves: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize" and (3) that there is a "dangerous probability" that the defendant will succeed in achieving monopoly power. App. 21 (quoting *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456 (1993)). The court properly ruled that the

[19] Compare J.S. 21-22 (raising questions of market definition, barriers to entry, monopoly power, anticompetitive conduct, and causation), with App. 4 (market definition); App. 5 (existence of the applications barrier to entry); App. 5-6 (Microsoft's possession of market power); App. 6-9 (definition of proscribed anticompetitive acts); App. 9-19 (description of specific instances of anticompetitive conduct); App. 19-20 (identification of Microsoft's "single, well-coordinated course" of anticompetitive action).

plaintiffs proved each of those elements. App. 21-24. As in the case of the monopoly maintenance claim, the court addressed Microsoft's specific objections, and the attempted monopolization claim is therefore also well postured for this Court's review. App. 21-24.[20]

3. The district court also ruled, on another matter that is not necessary to support the prescribed relief, that "Microsoft's combination of Windows and [IE] by contractual and technological artifices constitute[s] unlawful tying to the extent that those actions forced Microsoft's customers and consumers to take [IE] as a condition of obtaining Windows." App. 25. The district court acknowledged that its conclusion "is arguably at variance" with the court of appeals' prior decision in *United States* v. *Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998). App. 25. But the court concluded that the relevant passages of the court of appeals' decision, which dealt only with obligations under a consent decree, were dicta and did not control this Sherman Act case. App. 26. The court additionally concluded that this Court's decisions in *Eastman Kodak* and *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), support its conclusion that Microsoft unlawfully tied its products. App. 27-33. If Microsoft intends to dispute the district court's understanding of this Court's decisions—or seeks a special exception from those decisions—then this Court provides the proper forum in which to address that matter. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

4. Microsoft argues that the district court unduly expedited the proceedings in this case and improperly admitted, at the bench trial, hearsay evidence. J.S. 21. Resolution of those matters would not significantly burden the Court. A

[20] Compare J.S. 22 (raising questions respecting specific intent and probability of success), with App. 21-22 (proof of specific intent); App. 22-24 (proof of a "dangerous probability of success").

"trial court is endowed with great discretion to make decisions concerning trial schedules," *United States* v. *Taylor*, 487 U.S. 326, 343 (1988), and Microsoft must demonstrate that the court's scheduling actions in this case amount to an abuse of discretion. Microsoft has failed to identify an action that would constitute an abuse.[21] Similarly, a judge does not commit reversible error in admitting hearsay in a bench trial unless the judge improperly relies on that evidence. See *United States* v. *Matlock*, 415 U.S. 164, 175 (1974); *Multi-Medical Convalescent & Nursing Ctr.* v. *NLRB*, 550 F.2d 974, 977 (4th Cir. 1977), cert. denied, 434 U.S. 835 (1977). The district court stated repeatedly that it would assess hearsay evidence to determine what weight, if any, to give it. See, *e.g.*, Tr. 10:9-11 (2/11/99 am); Tr. 5:21-24, 10:19-23 (1/25/99 pm); Tr. 4:21-5:3 (10/20/98 pm). In so doing, the court acted well within its discretion. Microsoft has not identified any finding of fact supported only by inadmissible hearsay.

5. Microsoft's proposed challenge to the district court's remedy (J.S. 11-12, 23) presents a matter that ought to be decided by this Court, rather than the court of appeals, in

[21] Microsoft objects that the district court limited discovery to five months (J.S. 5-6, 21), but it is essential—if the antitrust laws are to be enforced efficiently and effectively in high-technology industries—that courts at all levels expedite important antitrust litigation. Microsoft has specified no prejudice to it from the discovery schedule. The pre-trial schedule was issued pursuant to a joint proposed scheduling order. Scheduling Order at 2 (Aug. 20, 1998). The district court fixed no upper limit to the number of interrogatories Microsoft could serve or depositions it could take, Pretrial Order No. 1, at 2 (June 12, 1998), and Microsoft has not explained how, in light of its virtually unlimited resources, its ability to conduct discovery was constrained. Microsoft's related assertion that the district court permitted plaintiffs to "broaden their case dramatically" (J.S. 21) simply ignores the complaint and the pretrial record. The Section 2 monopoly maintenance claim has been in the case from the outset, see, *e.g.*, Compl. ¶¶ 13, 36, 38, 98, 122, 138-139, and was the principal focus of the government's discovery and proof at trial.

light of the extraordinary public and private interests at stake. The task is an important one, but it is facilitated, to a considerable extent, by the applicable standard of review. District courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), and this Court has long held that it "will not direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185 (1944).[22]

In examining the remedy, the Court would obtain considerable assistance from the district court's cogent and thorough findings. The court found that Microsoft engaged in a pattern of predatory activity directed at innovations that threatened its monopoly. See App. 19-21. Its "corporate practice [has been] to pressure other firms to halt software development that either shows the potential to

[22] The established standards for antitrust relief also provide guidance. Relief in a Sherman Act case must (i) end the unlawful conduct, (ii) prevent its recurrence, and (iii) undo its anticompetitive consequences. See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972); *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). The district court unquestionably had power to order divestiture in this Section 2 case. See, *e.g.*, *United States* v. *United Shoe Mach. Corp.*, 391 U.S. 244 (1968) (reversing denial of petition for divestiture). "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *du Pont*, 366 U.S. at 326 (approving a divestiture). See *International Boxing Club* v. *United States*, 358 U.S. 242, 255-256 (1959); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 171-172 (1948). The question before this Court with respect to structural relief is limited to whether the district court abused its discretion in ordering a divestiture. The judgment appropriately directs Microsoft to propose a plan for the divestiture and leaves the details of that plan to future proceedings. App. 254-257. See, *e.g.*, *Citizen Publ'g Co.* v. *United States*, 394 U.S. 131, 135 (1969).

weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products." FF 93 (App. 89). The divestiture remedy limits OpsCo's ability to engage in that and other similar forms of anticompetitive conduct, while giving AppsCo increased incentives to offer applications that run on alternative operating systems and to develop cross-platform middleware.

The divestiture remedy responds directly to the district court's finding of monopoly maintenance by weakening the barrier to entry that Microsoft's predatory practices maintained and creating an independent entity, AppsCo, well positioned to renew the challenge to the operating system monopoly that Microsoft's restraints on Netscape and Java suppressed. Moreover, it does so without the need for an intrusive and cumbersome regulatory decree. The transitional conduct restrictions, which expire when divestiture is fully effective, are designed to address the specific exclusionary strategies that Microsoft pursued or similar strategies that may fairly be anticipated. Such remedies also fall well within the district court's discretion. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969).[23]

B. The Factual Record Presents No Obstacle To Direct Review. Microsoft argues that this Court should deny direct appeal because Microsoft intends to raise "numerous complicated factual issues" that will require the Court to "sift through an extensive record." J.S. 16-19. Microsoft's pre-

[23] Microsoft proposes to argue that the district court erred in entering the final judgment without holding a new evidentiary hearing on remedy. J.S. 23. That argument should not detain the Court. The court had discretion to decide whether additional hearings were needed, and it was entitled to conclude that the trial itself, which detailed the scope of the antitrust violations, provided an adequate basis for determining the scope of relief. The district court did not abuse its discretion in refusing to accede to Microsoft's belated requests for further delay. See App. 248-251.

diction, at the outset, is implausible. The district court trial was the "main event" for purposes of determining disputed facts. See *Anderson*, 470 U.S. at 575. The district court made cogent and comprehensive factual findings based on the evidence at trial. See App. 46-246. This Court has repeatedly emphasized that the "clearly erroneous standard," which governs review of district court factfinding, is highly deferential. *Anderson*, 470 U.S. at 571-576. That standard, by its own force, imposes inherent limits on the scope of fact-based challenges in a case such as this.[24]

Even if Microsoft is inclined to raise record-based challenges, that prospect would provide no basis for declining review. When Congress amended the Expediting Act, it was well aware that the records in government civil antitrust cases are frequently voluminous. S. Rep. No. 298, *supra*, at 8. Congress relieved the Court of the burden of routinely reviewing trial records in government civil antitrust cases, but it did so knowing that the Court would not shrink from that task in cases of general public importance. This Court has not been daunted by large antitrust records in exercising its certiorari jurisdiction.[25] It is, of course, counsel's responsibility to relate their contentions to the portions of the record that are pertinent. The Court's task here is not

[24] See, *e.g.*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *id.* at 575 ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be plain error.").

[25] See, *e.g.*, *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 254 (1993) (Stevens, J., dissenting) (private antitrust action involving "2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses"); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 577 (1986) (private antitrust action involving 217-page district court decision and a 40-volume joint appendix in this Court).

onerous. The Court regularly reviews cases that rest on factual records that are more challenging than this appeal would present.[26] Indeed, the Court regularly does so when exercising its original jurisdiction, where the Court must act as the ultimate *finder of fact* and review the evidence de novo. See *Colorado* v. *New Mexico*, 467 U.S. 310, 317 (1984).[27]

To the extent Microsoft elects to challenge the district court's findings, the Court should encounter no difficulty in applying the clearly erroneous standard. The district court has distilled the record into clear and well-organized findings of fact that provide a detailed roadmap of its reasoning. See App. 46-246; Add. A, *infra*.[28] The clearly erroneous stan-

[26] See, *e.g.*, *United States* v. *Fordice*, 505 U.S. 717, 725 (1992) (desegregation suit based on testimony of 71 witnesses and 56,700 pages of exhibits); *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 501 (1981) (challenge to OSHA "Cotton Dust" standards, which were based on a highly technical 105,000-page administrative record).

[27] For example, in *United States* v. *Alaska*, 521 U.S. 1(1997), the Court decided a federal-state dispute over the location of Alaska's entire northern coast line, relying on a 565-page Special Master's report and a voluminous record that embraced a series of complex trials that began in 1980 and continued through 1986. In *Kansas* v. *Colorado*, 514 U.S. 673 (1995), the Court decided an interstate dispute over use of the Arkansas River, relying on a 459-page Special Master's report and a record, compiled over 141 trial days, that included a 19,735-page trial transcript and more than 2000 exhibits. Each of those cases involved highly technical factual and legal issues. In each instance, upon receiving the Master's report, the Court nevertheless considered the briefs, heard oral argument, and issued its opinion in the course of a single Term. Contrary to Microsoft's suggestion (J.S. 26-27), there is no reason to think that the Court cannot likewise resolve this case in a single Term.

[28] Microsoft complains that the court's findings do not cite to record evidence (J.S. 19), but courts are required to make findings of fact, not to cite evidence. See Fed. R. Civ. P. 52(a); see also *Amadeo* v. *Zant*, 486 U.S. 214, 228 (1988). The absence of record citations poses no obstacle to review because the party challenging a particular finding must identify the evidence on which it relies to show clear error. See, *e.g.*, *United States*

dard is extremely demanding, and Microsoft's examples of purported error—which are presumably its strongest examples—do not come close to satisfying the test. See *Anderson*, 470 U.S. at 573- 576.[29]

C. Postponing This Court's Review To Permit Review By The Court Of Appeals Would Not Promote The Administration Of Justice. Microsoft argues (J.S. 23-24, 29) that

---

v. *United States Gypsum Co.*, 333 U.S. 364, 392-399 & nn.15-17 (1948) (reviewing, with no evident difficulty, findings of fact lacking record citations).

[29] Microsoft asserts (J.S. 18) that no "probative evidence" supports the district court's finding that "Microsoft has largely succeeded in exiling Navigator from the crucial OEM distribution channel." FF 239 (App. 159-160). The court, however, explicitly relied on a Microsoft document reporting that Navigator was being shipped through only four of the sixty OEM sub-channels. *Ibid.*; see GX 421.

Contrary to Microsoft's contention (J.S. 18), the court's further finding that "Navigator was present on the desktop of only a tiny percentage of PCs that OEMs were shipping," FF 239 (App. 160), is supported not only by the evidence from Microsoft's own document that Navigator is shipped through only four OEM sub-channels, GX 421, but also by the testimony of Franklin Fisher. Tr. 7:20-8:10, 11:15-12:10 (1/7/99 am); Tr. 42:15-21 (6/3/99 am). Microsoft ignores that evidence and cites a single document, containing an estimate that Navigator was included in "22% of OEM shipments." J.S. 18. But that estimate, which expressly states that Navigator shipments were "with minimal promotion," see GX 2440, does not reflect shipments in which Navigator is "on the desktop" rather than shipped "in a manner much less likely to lead to usage than if its icon appeared on the desktop." FF 239 (App. 159-160); see also GX 2116 (sealed).

Microsoft additionally asserts that "no probative evidence" supports the district court's finding (FF 161 (App. 122)) that "Microsoft 'bound' Internet Explorer to Windows 98" by commingling code specific to Web browsing with code that provides operating system functions. J.S. 18. Microsoft relies on testimony of its Senior Vice President James Allchin that there is no code specific to Web browsing in Windows 98 (J.S. 19), but on cross-examination Allchin admitted that Windows 98 contains code used only to browse the Web. Tr. 65:10-67:25 (2/2/99 am); see also Tr. 60:15-25 (12/14/98 am) (testimony of Edward Felten).

direct review is inappropriate because the court of appeals should be entitled to weigh in on this case. That argument disregards the purpose of the Expediting Act, which, "as its very title indicates, is to eliminate piecemeal appeals and to bring to the Supreme Court expeditiously, the entire case without intervening appeals to the Courts of Appeals." *IBM Corp.* v. *United States*, 480 F.2d 293, 296 (2d Cir. 1973), cert. denied, 416 U.S. 980 (1974). A litigant in federal court is normally entitled to only one appeal as of right. The Expediting Act reflects Congress's considered judgment that, when a government antitrust case presents an issue of "general public importance to the administration of justice," that appeal should take place in this Court.

Congress wisely preserved the Court's availability to hear cases of "general public importance" because it recognized that only this Court can ensure expeditious resolution of the appeal. If the Court accepts direct review in this case, it can surely complete the review process within the 2000 Term. See note 27, *supra*. If the Court declines, then the timing of a final resolution will be beyond any single court's control. The proceedings in the court of appeals are likely to consume at least as much time as proceedings in this Court, and the case is virtually certain to return to this Court on petition for a writ of certiorari. As a result, the final resolution of the appeal would likely be delayed by *at least* one year.

The district court, which commendably expedited the trial proceedings, certified this case for direct review in light of its awareness that a lengthy appeals process could irreparably harm competition in a vital and rapidly evolving sector of the national economy. The United States agrees. This Court alone has the authority, and therefore the responsibility, to ensure that the public interest is not harmed and that justice is not denied through delay.[30]

---

[30] Microsoft argues (J.S. 27) that the presence of the State plaintiffs provides a reason to deny the direct appeal under the Expediting Act. At

CONCLUSION

The Court should note probable jurisdiction and set the case for briefing and argument.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JOEL I. KLEIN
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
Attorney

AUGUST 2000

Microsoft's request, the district court consolidated the States' case with that of the United States "for all purposes" (Order (May 22, 1998)). There was a single trial, a single set of findings of fact, a single set of conclusions of law, and a single final judgment from which this appeal is taken. Although the States alleged violations of state antitrust laws, the district court applied Sherman Act standards. App. 39-40. In these circumstances, the States may be deemed "parties to the proceeding" and "[p]arties interested * * * in the judgment." Sup. Ct. R. 18.2. In any event, as a precautionary measure, the States intend to file a petition for certiorari before judgment in this case. Thus, if the Court concludes that it may lack jurisdiction over the state-related aspects of the appeal, it can either grant the petition or hold it pending resolution of the appeal and thereby avert any danger of redundant or inconsistent proceedings in the court of appeals. See *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934); *Roe* v. *Wade*, 410 U.S. 113, 123 (1973); *Clinton* v. *New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring and dissenting in part).

ADDENDUM A

Index to the Appendix to the Jurisdictional Statement in *Microsoft Corporation* v. *United States*, No. 00-139

	Page
Conclusions of law	1
I. Section Two of the Sherman Act	3
A. Maintenance of monopoly power by anti-competitive means	3
1. Monopoly power	3
2. Maintenance of monopoly power by anti-competitive means	6
a. Combating the browser threat	9
i. The OEM channel	10
ii. The IAP channel	14
iii. ICPs, ISVs and Apple	16
b. Combating the Java threat	17
c. Microsoft's conduct taken as a whole	19
B. Attempting to obtain monopoly power in a second market by anticompetitive means	21
II. Section One of the Sherman Act	24
A. Tying	25
B. Exclusive dealing arrangements	34
III. The state law claims	39
Order	44
Findings of fact	46
I. Background	47
II. The relevant market	51
A. Demand substitutability	51
1. Server operating systems	51
2. Non-Intel-compatible PC operating systems	52
3. Information appliances	53
4. Network computers	54

ADDENDUM A—Continued:

	Page
5. Server-based computing generally	56
6. Middleware	57
B. The possibility of supply responses	58
III. Microsoft's power in the relevant market	60
A. Market share	60
B. The applications barrier to entry	61
1. Description of the applications barrier to entry	61
2. Empirical evidence of the applications barrier to entry	66
a. OS/2 Warp	66
b. The Mac OS	67
c. Fringe operating systems	67
3. Open-source applications development	69
4. Cloning the 32-bit Windows APIs	69
C. Viable alternatives to Windows	70
D. Price restraint posed by Microsoft's installed base	72
E. Price restraint posed by piracy	73
F. Price restraint posed by long-term threats	73
G. Significance of Microsoft's innovation	74
H. Microsoft's pricing behavior	75
I. Microsoft's actions toward other firms	78
IV. The middleware threats	78
A. The Netscape Web browser	78
B. Sun's implementation of the Java technologies	80
C. Other middleware threats	82
V. Microsoft's response to the browser threat	83
A. Microsoft's attempt to dissuade Netscape from developing Navigator as a platform	83

ADDENDUM A—Continued:

	Page
B. Withholding crucial technical information	88
C. The similar experiences of other firms in dealing with Microsoft	89
1. Intel	90
2. Apple	94
3. RealNetworks	97
4. IBM	99
D. Developing competitive Web browsing software	108
E. Giving Internet Explorer away and rewarding firms that helped build its usage share	110
F. Excluding Navigator from important distribution channels	114
1. The importance of the OEM and IAP channels	115
2. Excluding Navigator from the OEM channel	117
a. Binding Internet Explorer to Windows	117
i. The status of Web browsers as separate products	117
ii. Microsoft's actions	119
iii. Lack of justification	128
iv. The market for Web browsing functionality	138
b. Preventing OEMs from removing the ready means of accessing Internet Explorer and from promoting Navigator in the boot sequence	139

ADDENDUM A—Continued:

	Page
c. Pressuring OEMs to promote Internet Explorer and to not pre-install or promote Navigator	155
d. The effect of Microsoft's actions in the OEM channel	159
3. Excluding Navigator from the IAP channel	161
a. The Internet Explorer access kit agreements	164
b. The referral server agreements	166
c. The online services folder agreements	175
i. AOL	176
ii. Other online services	193
d. Effect of Microsoft's actions in the IAP channel	194
4. Inducing ICPs to enhance Internet Explorer's usage share at Navigator's expense	196
5. Directly inducing ISVs to rely on Microsoft's browsing technologies rather than APIs exposed by Navigator	208
6. Foreclosing Apple as a distribution channel for Navigator	210
G. Microsoft's success in excluding Navigator from the channels that lead most efficiently to browser usage	218
H. The success of Microsoft's effort to maximize Internet Explorer's usage share at Navigator's expense	219
1. The change in the usage shares of Internet Explorer and Navigator	219

ADDENDUM A—Continued:

	Page
2. The cause of the change in usage shares	227
I. The success of Microsoft's effort to protect the applications barrier to entry from the threat posed by Navigator	228
VI. Microsoft's response to the threat posed by Sun's implementation of Java	232
A. Creating a Java implementation for Windows that undermined portability and was incompatible with other implementations	232
B. Inducing developers to use the Microsoft implementation of Java rather than Sun-compliant implementations	236
C. Thwarting the expansion of the Java class libraries	241
D. The effect of Microsoft's efforts to prevent Java from diminishing the applications barrier to entry	242
VII. The effect on consumers of Microsoft's efforts to protect the applications barrier to entry	243
Memorandum and Order	247
Final Judgment	253
Notice of appeal (No. 98-1232)	280
Notice of appeal (No. 98-1233)	282
Order (Nos. 98-1232, 98-1233)	284
Statutory provisions involved	286
Order (No. 98-1232)	311
Order (No. 98-1233	312

ADDENDUM B

Glossary of Frequently Used Terms

API	Application programming interface. APIs "exposed" by a computer program, such as an operating system or middleware, provide other computer programs with means of access to blocks of code that perform particular tasks, such as displaying text on the computer screen. FF 2 (App. 47).
IAP	Internet access provider. IAPs, such as America Online and MindSpring, provide computer users with access to the Internet. FF 15 (App. 50).
IE	Internet Explorer, Microsoft's Web browser. FF 17 (App. 51).
Intel-compatible PC	A PC designed to use a microprocessor in, or compatible with, Intel's 80x86/Pentium microprocessor family. FF 3 (App. 47).
Internet	A global electronic network of computers. FF 11 (App. 49).
Java	A programming language and related middleware that enable applications written in that language to run on different operating systems. FF 73 (App. 80).

JVM	Java Virtual Machine, a program that translates a Java-coded program into instructions that the operating system can understand and thus allows applications written in Java programming language to run on the operating system for which the JVM was written. FF 73 (App. 80).
Middleware	Software that relies on the APIs provided by the operating system on which it runs, but also exposes its own APIs. FF 28 (App. 57).
Navigator	Netscape Communications Corp.'s Web browser. FF 17 (App. 50-51).
OEM	Original equipment manufacturer. FF 10 (App. 49). In this brief, a manufacturer of PCs.
Operating System	A software program that controls the allocation and use of computer resources. FF 2 (App. 47).
PC	Personal computer. FF 1 (App. 47).
Platform	Software that exposes APIs. FF 2 (App. 47).
Web	The World Wide Web; a collection of digital information resources stored on servers throughout the Internet. FF 12 (App. 49).

Web Brower (or Browser)	Software that enables a user to select, retrieve, and perceive resources on the Web. FF 16 (App. 50). In this brief, the term "browser" by itself means "Web browser."
Windows	A family of software packages produced by Microsoft, each including an operating system. The principal members of this family for purposes of this case are Windows 95, Windows 98, and successors, which include operating systems for Intel-compatible PCs. FF 6-8 (App. 48-49).